(2)

No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

94-8769

TOMMY L. RUTLEDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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(9)

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars a court from entering judgments of conviction and imposing concurrent sentences on two separate counts in an indictment alleging, respectively, 1) that the defendant conducted a "continuing criminal enterprise" in violation of 21 U.S.C. § 848, and 2) that the defendant conspired to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846, where the conduct that forms the basis of the conspiracy count is identical to the conduct that establishes a necessary element in the count alleging a continuing criminal enterprise.

LIST OF PARTIES

Petitioner Tommy L. Rutledge was the only appellant in Case No. 93-1122 in the United States Court of Appeals for the Seventh Circuit. His case was consolidated on appeal with Case No. 93-2652, in which Shelly Henson was the only appellant, and Case No. 93-2653, in which Richard Hagemaster was the only appellant. Mr. Rutledge's appeal also was consolidated initially with Case No. 93-2654, in which Stan Winters was the only appellant, but that case subsequently was severed from the consolidated appeals. The United States of America was the only appellee in all of these appeals.

In the United States District Court for the Central District of Illinois, Mr. Rutledge was named as a co-defendant in a second superseding indictment with Shelly Henson, Richard Hagemaster, Stan Winters and Donald Taylor in Case No. 91 CR 40009. In a prior indictment in the same case, Mr. Rutledge had been named as a co-defendant with Roger Malott. The United States of America was the only plaintiff in that case.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

TOMMY L. RUTLEDGE,

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Tommy L. Rutledge respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's December 29, 1992, judgment of conviction and sentence (Pet. App. 13-24) is unreported. The November 10, 1994, opinion of the United States Court of Appeals for the Seventh Circuit affirming the district court's judgment is reported at 40 F.3d 879 (7th Cir. 1994), and is reproduced at pages 1 to 12 of the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its decision of November 10, 1994. A timely petition for rehearing and suggestion for rehearing en banc was denied on January 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;. . .

The full text of 21 U.S.C. § 848 (Continuing criminal enterprise) and 21 U.S.C. § 846 (Attempt and conspiracy) are set forth, respectively, at pages 37 to 45 and page 46 of the Appendix to this Petition.

STATEMENT

Petitioner Tommy L. Rutledge ("Mr. Rutledge") was named as a defendant in a second superseding indictment (the "indictment") filed on December 4, 1991, in the United States District Court for the Central District of Illinois. Count 1 of the indictment alleged that Mr. Rutledge "knowingly and intentionally did engage in a continuing criminal enterprise, namely a series of violations of Title 21, United States Code, Sections 841(a)(1) and 846" and that such conduct was "[i]n violation of Title 21, United States Code, Section

848." (Pet App. 26a-27a.) Count 2 of the indictment alleged that Mr. Rutledge, along with his co-defendants, had conspired between late 1988 and mid-1990 to possess cocaine with intent to distribute "in violation of Title 21, United States Code, Section 846." (Pet. App. 27a-28a.)[1] A jury trial commenced on June 16, 1992, and on June 25, 1992, the jury returned a verdict of guilty against Mr. Rutledge on all counts of the indictment. On December 29, 1992, Mr. Rutledge was sentenced, inter alia, to serve a prison term of life on the conviction under Count 1 of the indictment, and a prison term of life without possible release on Count 2 of the indictment. The judgment of the district court specified that the separate life sentences under Count 1 and Count 2 of the indictment would run concurrently. (Pet. App. 14.)

Mr. Rutledge appealed. He argued that both the entry of judgments of conviction and the imposition of concurrent sentences on both the continuing criminal enterprise ("CCE") charged in Count 1 and the conspiracy charged in Count 2 violated the Double Jeopardy Clause of the Fifth Amendment. (Pet. App. 9a.)[2] The court of appeals,

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[1] The indictment also charged Mr. Rutledge with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (Count 3), possession of a firearm after conviction of a felony in violation of 18 U.S.C. § 922(g) (Count 4), and carrying and using a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. 924(c) (Counts 5 and 6). (Pet. App. 28a-30a.) No questions are presented with respect to those counts in this Petition.

[2] Mr. Rutledge raised other errors with respect to both his trial and his sentencing. (Pet. App. 5a-9a.) Those other claims are not the subject of this Petition.

while agreeing that "the conspiracy charge is a lesser included offense of the CCE charge", rejected Mr. Rutledge's Double Jeopardy Clause argument by adhering to its previously stated position that "[c]oncurrent sentences may be imposed for conspiracy and CCE provided the cumulative punishment does not exceed the maximum under the CCE Act." (Pet. App. 9a, citing United States v. Bafia, 949 F.2d 1465, 1473 (7th Cir. 1991) and United States v. Bond, 847 F.2d 1233, 1239 (7th Cir. 1988).) The court of appeals affirmed Mr. Rutledge's convictions and sentences in their entirety.

REASONS FOR GRANTING THE WRIT

This Court should review the decision below to assess the Seventh Circuit's practice of allowing the entry of judgments of conviction and the imposition of concurrent sentences on CCE and conspiracy counts even where, as was admittedly the case here, the conduct charged in the conspiracy count is also a necessary element with respect to the CCE count. See Pet. App. 9a (Seventh Circuit agreeing that "the conspiracy charge is a lesser included offense of the CCE charge"). That practice follows from the Seventh Circuit's view that the Double Jeopardy Clause's protection against "multiple punishments for the same offense", North Carolina v. Pearce, 395 U.S. 711, 717 (1969), is not implicated in the context of concurrent sentences on CCE and conspiracy counts so long as the total length of the sentences does not exceed the maximum authorized under one of

the offenses of conviction. (Pet. App. 9a.) The Seventh Circuit's practice is contrary to the express teachings of this Court, as properly interpreted by nine circuit courts of appeals. Those courts prohibit even the entry of judgments of conviction on both CCE and conspiracy counts. The Seventh Circuit's view also is contrary to the position of the Solicitor General's Office as expressed to this Court only two terms ago in Mohwish v. United States, 113 S. Ct. 1378 (1993), vacating and remanding United States v. Patrick, 965 F.2d 1390 (6th Cir. 1992), on remand, 993 F.2d 123, 124 (6th Cir. 1993) (in case involving concurrent CCE and conspiracy sentences, Court granted certiorari and vacated judgment of court of appeals for remand in light of position of Acting Solicitor General; on remand, court of appeals "correct[ed] the oversight" by ordering district court to vacate the conspiracy conviction). As explained more fully below, the Seventh Circuit's erroneous practice appears to proceed from a mistaken belief that this Court's opinion in Garrett v. United States, 471 U.S. 773 (1985) modified this Court's views as stated in Jeffers v. United States, 432 U.S. 137 (1977).

The Seventh Circuit is the only court of appeals that permits the imposition of concurrent sentences on CCE and conspiracy counts. As shown below, however, two other courts of appeals -- the Second Circuit and the Third Circuit -- also reject the majority approach by permitting the entry of separate judgments of conviction on CCE and conspiracy

guilty verdicts, so long as only one sentence is imposed. This case presents an opportunity to bring the Double Jeopardy Clause jurisprudence of the courts of appeals in the minority into line with the controlling precedents of this Court and with a significant majority of the other courts of appeals. This case also provides an excellent opportunity to articulate more general principles as to the particular steps that should be taken to avoid a "multiple punishment" Double Jeopardy Clause violation in cases where a jury returns a guilty verdict on two counts for which the legislature did not intend to impose cumulative punishment.

I. THE SEVENTH CIRCUIT'S PRACTICE OF ALLOWING ENTRY OF JUDGMENTS OF CONVICTION AND CONCURRENT SENTENCES ON CCE AND CONSPIRACY VERDICTS IS IN CONFLICT WITH THE PRACTICE ADOPTED BY MOST CIRCUITS AS A CONSEQUENCE OF THIS COURT'S DECISION IN JEFFERS v. UNITED STATES AND BALL v. UNITED STATES.

In this case, as in all cases raising questions relating to the multiple punishments protection of the Double Jeopardy Clause, the threshold question is whether the legislature intended to impose cumulative punishment upon a finding of guilt of separately enumerated offenses. Garrett v. United States, 471 U.S. 773, 778 (1985). This Court has already answered that question with respect to 21 U.S.C. § 848 (CCE) and 21 U.S.C. § 846 (conspiracy). In Jeffers v. United States, 432 U.S. 137, 155-56 (1977), Justice Blackmun, writing for a four-judge plurality, concluded that Congress did not intend "to allow cumulative punishment for violations

of §§ 846 and 848."[3/] The concurring opinion of Justice Stevens, joined by the remaining three justices who heard the case, agreed with the plurality that cumulative punishment may not be imposed for violations of §§ 848 and 846. Id. at 160. Thus it was the unanimous conclusion of the Court that, because of Congress's intent, the Double Jeopardy Clause bars cumulative punishment for CCE and conspiracy violations.

Given that Congress did not intend to impose cumulative punishment for CCE and conspiracy violations, the Double Jeopardy Clause bars the imposition of concurrent sentences on both counts, and even the entry of judgments of conviction on both verdicts. That conclusion follows from this Court's decision in Ball v. United States, 470 U.S. 856 (1985). In Ball, this Court held that Congress did not intend to allow cumulative punishment for the same conduct that resulted in separate violations of statutes prohibiting receiving a firearm (18 U.S.C. § 922(h)(1)) and possessing the same firearm (18 U.S.C. § 1202 (a)(1)). Id. at 865. Accordingly, the Court held without dissent that "the second conviction, even if it results in no greater sentence, is an impermissible punishment." Id. at 865 (emphasis supplied); see also id. at 864-65 ("[t]he second conviction, whose

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[3/] The basis of this conclusion was that both statutes are directed at the incremental harm associated with concerted activity in the area of narcotics trafficking. 432 U.S. at 157. See infra 11-12 (showing that similar analysis does not apply to substantive offenses, thus distinguishing this Court's holding in Garrett v. United States, 471 U.S. 773 (1985), on which the Seventh Circuit has erroneously relied in the CCE/conspiracy context.)

concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence"). The Court did expressly permit multiple-count indictments and submission to the jury of separate counts alleging separate offenses for which Congress intended no cumulative punishment. But the Court held that the Double Jeopardy Clause requires that the line be drawn at the return of a guilty verdict. Judgment may not be entered on both verdicts unless the legislature intends to allow separate punishment. A fortiori, the Double Jeopardy Clause proscribes concurrent sentences where such intent is lacking.

Recognizing that Jeffers and Ball combine to foreclose the imposition of concurrent sentences, or even entry of judgments of conviction, on both CCE and conspiracy verdicts, nine courts of appeals have so held expressly. See, e.g., United States v. Rivera-Martinez, 931 F.2d 148, 152-53 (1st Cir. 1991), cert. denied, 502 U.S. 862 (1991); United States v. Butler, 885 F.2d 195, 201-202 (4th Cir. 1989); United States v. Neal, 27 F.3d 1035, 1054 (5th Cir. 1994), cert. denied, 1155 S. Ct. 1165 (1995); United States v. Paulino, 935 F.2d 739, 751 (6th Cir.), cert. denied, 112 S. Ct. 315 (1991); United States v. Possick, 849 F.2d 332, 341 (8th Cir. 1988); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1582 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990); United States v. Stallings, 810 F.2d 973, 975-76

(10th Cir. 1990); United States v. Cruz, 805 F.2d 1464, 1479 (11th Cir. 1986), cert. denied, 481 U.S. 1006 (1987).[4]

The Seventh Circuit, on the other hand, has rejected this logical constitutional analysis in recent years, and now permits the imposition of concurrent sentences for CCE and conspiracy violations. That was not always the case. In United States v. Jefferson, 714 F.2d 689, 705 (7th Cir. 1983) ("Jefferson I"), the Seventh Circuit vacated and remanded a district court's imposition of consecutive sentences for CCE and substantive drug violations, while affirming the underlying convictions. The Seventh Circuit, relying on Jeffers, also ordered the district court to vacate both the defendant's conspiracy conviction and her sentence under 21 U.S.C. § 846 because the conspiracy conviction and

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[4] The District of Columbia Circuit reached the same conclusion in United States v. Anderson, 39 F.3d 331, 357 (D.C. Cir. 1994). On February 9, 1995, the District of Columbia Circuit granted a suggestion for rehearing en banc and vacated the panel opinion in Anderson. 39 F.3d at 361. The en banc rehearing will address the unrelated question of whether a defendant may be convicted of multiple violations of 18 U.S.C. 924(c)(1) when the government proves only one crime of violence or drug trafficking. See id. at 359 (dissent of Silberman, J.); see also United States v. Anderson, 1995 WL 79398 (D.C. Cir. Feb. 14, 1995) (order specifying issue to be briefed on rehearing en banc). Even before this Court's opinion in Ball, the District of Columbia Circuit and a number of other courts of appeals had ruled that the Double Jeopardy Clause bars both entry of judgment and imposition of concurrent sentences on separate CCE and conspiracy counts. See, e.g., United States v. Smith, 703 F.2d 627, 628 (D.C. Cir. 1983); United States v. Webster, 639 F.2d 174, 182 (4th Cir.) cert. denied, 454 U.S. 857 (1981); United States v. Michel, 588 F.2d 986, 1001 (5th Cir.), cert. denied, 444 U.S. 825 (1979); United States v. Dickey, 736 F.2d 571, 596-97 (10th Cir. 1984), cert. denied, 469 U.S. 1188 (1985); United States v. Graziano, 710 F.2d 691, 699 (11th Cir. 1983), cert. denied, 466 U.S. 937 (1984).

sentence were impermissibly cumulative in light of the defendant's CCE conviction and sentence under 21 U.S.C. § 848. Id. at 705-06. On a second appeal, after the remand to the district court, the Seventh Circuit affirmed concurrent sentences imposed upon entry of judgment on both CCE and substantive offenses. United States v. Jefferson, 760 F.2d 821 (7th Cir. 1985) ("Jefferson II"). This Court granted a petition for a writ of certiorari and vacated and remanded Jefferson II for reconsideration in light of Garrett v. United States, 471 U.S. 773 (1985). Jefferson v. United States, 474 U.S. 806 (1985). In Garrett, this Court held that cumulative sentences were permissible for CCE violations and substantive controlled substance offenses under 21 U.S.C.§ 841(b)(1)(a). Id. at 794. There, this Court expressly approved the plurality opinion in Jeffers insofar as it held that cumulative penalties may not, consistent with the protections of the Double Jeopardy Clause, be imposed on guilty verdicts on CCE and conspiracy counts. Id.

Garrett thus expressly reaffirmed the proscription of cumulative penalties for CCE and conspiracy violations.[5] The implication of this Court's decision to vacate and remand Jefferson II therefore was that, while it was proper to impose cumulative punishment for CCE and substantive drug offenses, separate judgments of conviction on CCE and

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[5] Garrett also was decided after Ball, 470 U.S. 856 (1985), which held that separate judgments of conviction cannot be entered on separate counts for which the legislature did not intend cumulative punishment.

conspiracy counts were forbidden by the Double Jeopardy Clause. The Seventh Circuit, however, misinterpreted the remand order in Jefferson II and went in exactly the opposite, and wrong, direction after this Court vacated and remanded Jefferson II. Instead of standing by its original decision to vacate the conspiracy conviction in Jefferson I -- as it should have in light of Jeffers, Ball, and Garrett -- the Seventh Circuit ordered the district court to reinstate the original sentence, which, as noted above, included sentences on both the CCE and conspiracy counts. United States v. Jefferson, 782 F.2d 697, 707 (7th Cir. 1986).

The Seventh Circuit apparently believes that Garrett somehow altered the principle articulated in Jeffers -- rather than reaffirmed its holding in the conspiracy context -- possibly because the Seventh Circuit believes, erroneously, that Garrett involved a conspiracy conviction, when in fact a substantive offense was at issue. See United States v. Bafia, 949 F.2d 1465, 1472 (7th Cir. 1991), cert. denied, 112 S. Ct. 1989 (1992) (claiming that Supreme Court "affirmed Garrett's sentence which included concurrent sentences for CCE and conspiracy convictions"). The Seventh Circuit has misread Garrett and incorrectly equated substantive offenses and conspiracy in the CCE context for purposes of Double Jeopardy Clause analysis. As noted above (pp. 6-7), the basis for the finding in Jeffers that Congress did not intend cumulative punishment for CCE and conspiracy violations was that both statutes are aimed at the

"additional dangers posed by concerted activity." Jeffers, 432 U.S. at 157. There is, however, no such duplication between the purposes of substantive drug offenses and the proscription of continuing criminal enterprises found in 21 U.S.C. § 848, the CCE statute. Jeffers and Garrett are completely consistent.

Not surprisingly, therefore, no less than nine courts of appeals have held after this Court's decision in Garrett that Jeffers remains good law, and that the Double Jeopardy Clause forbids the entry of judgments of conviction, and consequently the imposition of even a concurrent sentence, for both CCE and conspiracy violations. See supra 8-9. On the other hand, two courts of appeals besides the Seventh Circuit have failed to adopt the majority approach. The Second Circuit and the Third Circuit both permit the entry judgment on CCE and conspiracy counts, although those courts do not go as far as the Seventh Circuit does in allowing the imposition of concurrent sentences. See United States v. A[redacted]lo, 771 F.2d 621, 632-35 (2d Cir. 1985); United States v. Fernandez, 916 F.2d 125, 128-29 (3d Cir. 1990), cert. denied, 500 U.S. 984 (1991). This Court should resolve the manifest dispute between these three courts of appeals and the majority.

The Seventh Circuit's continued adherence to its minority position is particularly puzzling in light of this Court's recent action in Mohwish v. United States, 113 S. Ct. 1378 (1993). In Mohwish the Sixth Circuit had mistakenly

failed to vacate a conspiracy conviction under 21 U.S.C. § 846 in a case where the defendant had also been sentenced on a CCE count. United States v. Mohwish, 965 F.2d 1390 (6th Cir. 1992). The defendant petitioned this Court for certiorari. The Acting Solicitor General submitted a brief which endorsed the majority view as to the proper manner in which to proceed upon a finding of guilt on both conspiracy and CCE counts:

> . . . Congress did not intend to permit cumulative punishment for participating in a drug conspiracy and engaging in a continuing criminal enterprise, at least where the evidence supporting the "in concert" element of the CCE offense is essentially indistinguishable from the evidence supporting the drug conspiracy charge. See Garrett v. United States, 471 U.S. 773, 794 (1985); Jeffers v. United States, 432 U.S. 137, 155 (1977) (plurality opinion). The Sixth Circuit, like a number of other courts of appeals, has determined that a drug conspiracy conviction should thus be vacated when the defendant is also convicted on a CCE count.

Brief for United States at 14, Mohwish v. United States, 113 S. Ct. 1378 (1993) (No. 92-282).

This Court granted certiorari in Mohwish, vacated the Sixth Circuit's judgment, and remanded for further consideration in light of the Acting Solicitor General's position. On remand the Sixth Circuit recognized its mistake and ordered that the defendant's conspiracy conviction be vacated. United States v. Mohwish, 993 F.2d 123, 124 (6th Cir. 1993).

Mr. Rutledge called Mohwish to the Seventh Circuit's attention twice, first in a pro se Federal Rule of Appellate Procedure 28(j) submission five weeks before the Seventh Circuit decided his case (Pet. App. 31a-33a), and again in a pro se rehearing petition. (Pet. App. 34a-36a.) On both occasions, the Seventh Circuit refused to reconsider its previously held position on the Double Jeopardy Clause issue. Indeed, the Seventh Circuit has announced that it will continue to approve entry of judgments of conviction and concurrent sentences on CCE and conspiracy counts "until the Supreme Court directs otherwise." United States v. Bafia, 949 F.2d at 1472.

Most courts of appeals have recognized that this Court has directed that judgments of conviction and concurrent sentences may not be entered on separate CCE and conspiracy verdicts in circumstances such as those present in this case. Three courts of appeals have, to varying degrees, resisted that conclusion. This Court should review the opinion below and issue a full opinion expressly directing courts of appeals in the minority to conform their approach to the requirements of the Double Jeopardy Clause. Alternatively, the Court may wish to issue a writ of certiorari, summarily vacate the judgment of the Seventh Circuit, and remand the case for reconsideration in light of Jeffers and Ball. By whatever means, this Court should now unify the practice of the courts of appeals with respect to this recurring and important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Appendix A - Seventh Circuit Opinion . . . . . 1a - 12a

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**UNITED STATES of America, Plaintiff-Appellee,
v.
Tommy L. RUTLEDGE, Shelly Henson, and Richard Hagemaster, Defendants-Appellants.**

Nos. 93-1122, 93-2652 and 93-2653.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 9, 1994.

Decided Nov. 10, 1994.
Rehearing and Suggestion for Rehearing En Banc Denied Jan. 3, 1995 in No. 93-1122.

Defendants were convicted in the United States District Court for the Central District of Illinois, Michael M. Mihm, Chief Judge, of conspiring to distribute cocaine and one defendant was convicted of conducting a continuing criminal enterprise, distribution of cocaine, possession of a firearm by a felon, and using or carrying a firearm during the commission of a drug felony. Defendants appealed. The Court of Appeals, Bauer, Circuit Judge, held that: (1) defendant suffered no prejudice and trial court handled incident properly when two or three jurors briefly saw defendant handcuffed outside courtroom; (2) evidence was sufficient to support conviction for conspiracy to distribute cocaine; and (3) in-court identification of defendant was reliable and, thus, properly admissible.

Affirmed.

[1] CRIMINAL LAW ⇐ 1166.8
110k1166.8
Defendant suffered no prejudice when two or three jurors briefly saw defendant handcuffed outside courtroom where it was unclear whether at first glance jurors necessarily knew that defendant was handcuffed, defendant raised his handcuffed hands in exaggerated manner to show jurors handcuffs, defendant was immediately led away, trial judge offered to give jury cautioning instruction regarding incident, defendant, after conferring with counsel, indicated that he did not want such instruction, defendant failed to present any evidence from which it could be found that he suffered actual prejudice, and defendant did not request voir dire of jurors at time incident happened.

[2] CRIMINAL LAW ⇐ 1166.8
110k1166.8
Prejudice does not automatically inhere in trial when juror inadvertently sees defendant in handcuffs.

[3] CRIMINAL LAW ⇐ 1163(2)
110k1163(2)
Defendant, who is seen by jurors in handcuffs outside of courtroom, bears burden of proving that he suffered actual prejudice sufficient to warrant new trial.

[4] WITNESSES ⇐ 396(1)
410k396(1)
Witness' testimony regarding defendant's threats of gang retaliation was highly probative evidence explaining witness' prior inconsistent statement and trial court did not abuse its discretion in admitting testimony in drug prosecution; witness perjured himself before grand jury by denying that defendant operated drug ring out of fear of gang retaliation and government had right to rehabilitate witness by explaining prior perjury. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 1153(1)
110k1153(1)
Court of Appeals reviews trial court's decision to admit evidence for an abuse of trial court's discretion.

[6] CRIMINAL LAW ⇐ 986.4(3)
110k986.4(3)
Witness' statements in presentence report, describing incident in which defendant showed witness marijuana and cocaine in trunk of defendant's car and of other occasions on which witness accompanied defendant to deliver or obtain cocaine, bore sufficient indicia of reliability to be admissible, although witness did not testify at trial or

sentencing hearing, where government case agent established reliability by testifying that he had compared statements in presentence report with statements and trial testimony of other witnesses and with physical evidence and found no significant inconsistencies and defendant failed to present evidence beyond mere denial calling reliability or correctness of alleged facts into question.

[7] DOUBLE JEOPARDY ⇐ 151(5)
135Hk151(5)
While conspiracy to distribute cocaine is a lesser included offense of conducting a continuing criminal enterprise (CCE), double jeopardy is not implicated as long as district court does not impose cumulative sentences for the crimes. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 408, 21 U.S.C.A. §§ 846, 848.

[8] CRIMINAL LAW ⇐ 1210(3)
110k1210(3)
Concurrent sentences may be imposed for conspiracy to distribute cocaine and conducting a continuing criminal enterprise (CCE) provided the cumulative punishment does not exceed the maximum under the CCE statute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 408, 21 U.S.C.A. §§ 846, 848.

[9] DOUBLE JEOPARDY ⇐ 151(5)
135Hk151(5)
Imposing concurrent life sentences for conspiracy to distribute cocaine and conducting a continuing criminal enterprise (CCE) did not violate double jeopardy where maximum penalty under CCE statute at time of sentencing was life imprisonment. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 408, 21 U.S.C.A. §§ 846, 848.

[10] CONSPIRACY ⇐ 47(12)
91k47(12)
Evidence sustained conviction for conspiracy to distribute cocaine; witnesses immediately involved in drug conspiracy testified that defendant obtained cocaine from coconspirator, sold drugs that she received from coconspirator while living with him, helped pay bills with money she earned selling coconspirator's drugs, second witness testified that defendant sold and delivered cocaine for coconspirator and collected payment, third witness testified that defendant kept coconspirator's accounts regarding drug transactions, and fourth witness testified that defendant arranged cocaine sales for coconspirator and collected payments. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[11] CRIMINAL LAW ⇐ 1144.13(3)
110k1144.13(3)
When reviewing claim challenging sufficiency of the evidence, appellate court must review evidence in light most favorable to government, drawing all reasonable inferences; then, appellate court must ascertain whether any rational trier of fact could have found the essential elements of crime beyond a reasonable doubt.

[11] CRIMINAL LAW ⇐ 1144.13(5)
110k1144.13(5)
When reviewing claim challenging sufficiency of the evidence, appellate court must review evidence in light most favorable to government, drawing all reasonable inferences; then, appellate court must ascertain whether any rational trier of fact could have found the essential elements of crime beyond a reasonable doubt.

[11] CRIMINAL LAW ⇐ 1159.2(7)
110k1159.2(7)
When reviewing claim challenging sufficiency of the evidence, appellate court must review evidence in light most favorable to government, drawing all reasonable inferences; then, appellate court must ascertain whether any rational trier of fact could have found the essential elements of crime beyond a reasonable doubt.

[12] CRIMINAL LAW ⇐ 404.65
110k404.65
Pistol defendant kept in her possession was admissible in prosecution for conspiracy to distribute cocaine where district court

provided jury with several instructions regarding limited purposes for which they could consider evidence and government properly presented evidence to demonstrate defendant's role in drug enterprise and to connect coconspirator to gun. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[12] CRIMINAL LAW ⇐ 673(1)
110k673(1)
Pistol defendant kept in her possession was admissible in prosecution for conspiracy to distribute cocaine where district court provided jury with several instructions regarding limited purposes for which they could consider evidence and government properly presented evidence to demonstrate defendant's role in drug enterprise and to connect coconspirator to gun. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[13] CONSTITUTIONAL LAW ⇐ 268(8)
92k268(8)
Although prosecutor's statements during closing argument in prosecution for conspiring to distribute cocaine, commenting on credibility of defense witness and that "defense should have been embarrassed to hear her say that," were improper, they did not rise to level of due process violation where they were directed at witness for codefendant and did not bear at all on evidence presented against defendant, judge quickly granted defense counsel's objection, defense counsel had ample opportunity to counter prosecutor's comments during course of her argument, and evidence was overwhelmingly against defendant. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[13] CRIMINAL LAW ⇐ 720(5)
110k720(5)
Although prosecutor's statements during closing argument in prosecution for conspiring to distribute cocaine, commenting on credibility of defense witness and that "defense should have been embarrassed to hear her say that," were improper, they did not rise to level of due process violation where they were directed at witness for codefendant and did not bear at all on evidence presented against defendant, judge quickly granted defense counsel's objection, defense counsel had ample opportunity to counter prosecutor's comments during course of her argument, and evidence was overwhelmingly against defendant. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[14] CRIMINAL LAW ⇐ 1134(3)
110k1134(3)
Appellate court evaluates prosecutor's comments to determine whether they were improper; if so, a new trial is warranted only if the prosecutor's comments infected trial with unfairness as to make the resulting conviction a denial of due process. U.S.C.A. Const.Amend. 5.

[14] CRIMINAL LAW ⇐ 1171.1(2.1)
110k1171.1(2.1)
Appellate court evaluates prosecutor's comments to determine whether they were improper; if so, a new trial is warranted only if the prosecutor's comments infected trial with unfairness as to make the resulting conviction a denial of due process. U.S.C.A. Const.Amend. 5.

[15] CONSPIRACY ⇐ 24(1)
91k24(1)
If jury should find that particular defendant did not join in conspiracy that was charged in indictment, it must find defendant not guilty of conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[16] CRIMINAL LAW ⇐ 822(1)
110k822(1)
In reviewing fitness of jury instructions to which objections were properly raised in proceedings below, appellate court must determine from looking at charge as a whole, whether jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.

[17] CRIMINAL LAW ⇐ 770(2)
110k770(2)

Defendant is not entitled to have a particular instruction presented to jury, but only to have her theory of the defense presented.

[17] CRIMINAL LAW ⇐ 834(1)
110k834(1)
Defendant is not entitled to have a particular instruction presented to jury, but only to have her theory of the defense presented.

[18] CRIMINAL LAW ⇐ 805(1)
110k805(1)
In matters regarding jury instructions, district court is given substantial discretion with respect to specific wording of instruction.

[19] CRIMINAL LAW ⇐ 339.9(2)
110k339.9(2)
In-court identification of defendant was reliable and, thus, admissible, although lapse of time between commission of crime and trial was not insignificant, where witness testified that he spent 30 minutes with defendant in well-lighted room at time of crime, that he had ample opportunity to view defendant, witness' testimony indicated that he was quite attentive during commission of crime, and witness described defendant's vehicle and appearance in significant detail. U.S.C.A. Const.Amend. 5.

[20] CRIMINAL LAW ⇐ 339.10(1)
110k339.10(1)
Admissibility of challenged in-court identification is governed by two-part test; first, appellate court must determine whether initial out-of-court identification was unduly suggestive; if so, in-court identification is inadmissible unless it is so reliable, in view of totality of the circumstances, as to prevent substantial likelihood of misidentification.

[21] CRIMINAL LAW ⇐ 339.9(1)
110k339.9(1)
Reliability of in-court identification is guided by several factors: the opportunity of witness to view criminal at time of crime, witness' degree of attention, accuracy of his prior description of criminal, level of certainty demonstrated at confrontation, and time of crime and confrontation.

*881 K. Tate Chambers, Asst. U.S. Atty. (argued), Peoria, IL, for U.S.

Julia M. Gentile (argued), E.P.A., Springfield, IL, for Tommy L. Rutledge.

Spencer L. Daniels (argued), Peoria, IL, for Shelly Henson.

Jeffrey W. DeJoode (argued), March & McMillan, Macomb, IL, for Richard Hagemaster.

882 Before BAUER and FLAUM, Circuit Judges, and FOREMAN, [FN] District Judge.

FN* The Honorable James L. Foreman, of the United States District Court for the Southern District of Illinois, is sitting by designation.

BAUER, Circuit Judge.

A jury convicted Tommy Lee Rutledge, Shelly Henson, Richard Hagemaster, and Stan Winters of conspiring to distribute cocaine in violation of 21 U.S.C. § 846. Additionally, the jury convicted Rutledge of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848, distribution of cocaine in violation of 21 U.S.C. § 841(a)(1), possession of a firearm by a felon in violation of 18 U.S.C. § 922(g), and using or carrying a firearm during the commission of a drug felony in violation of 18 U.S.C. § 924(c). Rutledge, Henson, and Hagemaster appealed citing a surfeit of defects in their collective prosecution. Because we find no merit to their arguments, we affirm.

I. Facts

In November 1986, after his release from prison, Rutledge began dealing cocaine, a formative step that would soon develop into an extensive drug distribution network. From his base in Chicago, Rutledge would travel every two weeks to Astoria, Illinois to deliver up to two ounces of cocaine to Roger Malott. Soon thereafter, Rutledge moved to Youngstown, Illinois and put Malott to work for him, delivering cocaine and collecting debts resulting from drug sales. Rutledge's

initial source of cocaine was Juan Gonzalez of Burlington, Iowa, an acquaintance of Rutledge's from prison and a member of the Latin Kings street gang based in Chicago.

Over the next several months, Rutledge convinced several people to join his enterprise, including Shelly Henson, Richard Hagemaster, Rick Bolen, Randy Mustread, Kim Mummert, Tom Crowe, and Stan Winters. At one point, to demonstrate to Bolen that he was a major drug dealer and to convince him to join his outfit, Rutledge showed Bolen fifty pounds of marijuana and one-eighth of a pound of cocaine stored in the trunk of his car.

Rutledge's methods of doing business were in many ways similar to those of his peers in the drug business. Firearms figured prominently in Rutledge's enterprise. Not only did he maintain a cache of weaponry to protect himself, his employees, and his inventory of drugs, Rutledge also trafficked in firearms. He was more than happy to trade firearms for cocaine and receive firearms in payment for cocaine shipments.

As if the constant presence of firearms was not enough, Rutledge used his connections with the Latin Kings (presumably forged during one of his stints in prison) to maintain control over his operation. He frequently invoked the name of the Latin Kings to intimidate employees and customers alike. Rutledge, however, reserved his most ominous invocation of the Latin Kings for his employees to ensure that no employee would implicate him in this drug enterprise. We will expand on Rutledge's use of this tactic shortly.

At some point during the course of his cocaine conspiracy, Rutledge changed the source of his cocaine; he began to buy cocaine from Roberto Laurel, a member of the Latin Kings in Chicago. Consistent with his modus operandi, Rutledge also traded arms with Laurel. To execute his transactions with Laurel, Rutledge would travel with, or send to Chicago in varying combinations, Malott, Mustread, Henson, and Mummert.

From November 1988 through July 1989, Rutledge's base of operations was a trailer he shared with Mummert, Henson, and Hagemaster in Youngstown. Rutledge supported these three and provided them with cocaine. At this time, Rutledge employed Malott and Crowe in addition to his roommates. Henson, however, moved out of the trailer in July 1989 and terminated her association with Rutledge.

Henson's departure was likely hastened when Rutledge was arrested in the trailer in July 1989 by the Illinois State Police on the basis of statements made by Malott that Rutledge was involved with drugs and guns. The arresting officers discovered Rutledge's *883 cache of weapons, but apparently found no drugs. When he learned of Malott's statement to the police, Rutledge threatened Malott with serious harm if Malott testified against him in court. Rutledge made similar threats to Mummert. Rutledge's intimidation succeeded; both Malott and Mummert testified before a state grand jury that Rutledge was not involved with drugs or guns. Rutledge was subsequently released.

Rutledge continued his drug operation until he was arrested by federal authorities in December 1990. Rutledge, Henson, Hagemaster, and Winters were indicted in February 1991. Malott, Mummert, Mustread, and a frequent customer of Rutledge's, Michael Wright, cooperated with the government and testified as to their experiences with Rutledge and his drug ring.

II. Analysis

A. Tommy Lee Rutledge

[1] Rutledge's first argument is that he was denied a fair trial because two or three jurors encountered Rutledge in handcuffs outside the courtroom during the course of the trial. He contends that the trial court should have voir dire 'd those jurors to determine whether Rutledge was prejudiced by this incident. As we shall explain, Rutledge received a trial as fair as possible given his own conduct, and the trial court handled the situation perfectly.

On the first afternoon of the trial, Rutledge made a statement to the Deputy United States Marshals to the effect of "what if I take off now?" [FN1] While the deputies believed that Rutledge was not serious in his threat, they discussed the situation and decided that Rutledge must be handcuffed going to and from the courtroom. On the morning of the second day of the trial, the prosecutor brought this incident to the attention of the trial judge, who approved handcuffing Rutledge.

> FN1. Deputy Kevin Jackson reported that he did not recall exactly what Rutledge had said but that it was a statement similar to "what if I take off now?" or "what if I flee?"

To ensure that no jurors saw Rutledge being taken out of the courtroom in handcuffs, the deputies adopted certain procedures for bringing Rutledge in and out of the courtroom. Prior to taking Rutledge out of the courtroom, one deputy would check the outer hallway to ascertain whether any jurors were present. If the hallway was clear, the deputies would then lead Rutledge out of the courtroom into that outer hallway. Unfortunately, these measures were not foolproof.

At one point during the trial, two or three jurors briefly saw Rutledge in handcuffs. The deputies followed the procedures they had adopted for Rutledge, but the jurors entered the hallway just after it was checked. It is unclear whether at first glance the jurors necessarily knew that Rutledge was handcuffed; just to make sure that none of the jurors missed it, Rutledge raised his handcuffed hands in an exaggerated manner to show the jurors his handcuffs. Rutledge was immediately led away so that no additional jurors were treated to a similar demonstration.

The parties immediately brought this incident to the attention of the trial judge. The trial judge then offered to give the jury a cautioning instruction regarding the incident. He continued:

> What I would suggest is that I simply make a statement to the jury that it has come to my attention that some of the jurors may have become aware of the fact that he is in custody and that's a reality in this case and I will caution them that the fact that he is in custody should not in any way be considered by them as any evidence or suggestion of guilt. Is that how you want to handle it or would you suggest something else?

After conferring with his client, Rutledge's counsel stated: "We would like to just skip it, your Honor."

Rutledge claims that such a sighting by jurors of a defendant in handcuffs is inherently prejudicial. Therefore, he argues that a curative instruction from the trial judge is obviously insufficient and that, in this case, the trial judge, sua sponte, should have voir dire 'd the jurors in question. Rutledge did not request such a voir dire from the judge *884 at the time it happened. We believe this omission combined with Rutledge's failure to present any evidence from which we might find that he suffered actual prejudice resulting from this incident demonstrates that this argument lacks merit.

[2][3] While we believe that this may be the first time that we have been squarely presented with this issue, we recently noted that "[c]ourts have generally found inadvertent sightings of shackles by the jury to be insufficient to demonstrate prejudice." Woods v. Thieret, 5 F.3d 244, 248 n. 5 (7th Cir.1993) (citing Harrell v. Israel, 672 F.2d 632, 637 (7th Cir.1982) (citations omitted)). We therefore categorically reject Rutledge's argument that prejudice automatically inheres in a trial when a juror inadvertently sees a defendant in handcuffs. Our position is in accord with other circuits that have addressed this issue. See, e.g., United States v. Ware, 897 F.2d 1538, 1542 (10th Cir.), cert. denied, 496 U.S. 930, 110 S.Ct. 2629, 110 L.Ed.2d 649 (1990); United States v. Garcia-Rosa, 876 F.2d 209, 236 (1st Cir.1989); United States v. Halliburton, 870 F.2d 557, 561 (9th Cir.), cert. denied, 492 U.S. 910, 109 S.Ct. 3227, 106 L.Ed.2d 575 (1989). In situations such as this one, we hold that the defendant bears the burden of proving that he has suffered actual prejudice. See, e.g., Garcia-Rosa, 876 F.2d at 236. Here, neither Rutledge nor the record

indicate that Rutledge has suffered actual prejudice.

The trial judge, in the best position to evaluate such things, stated on the record that he believed that Rutledge suffered no prejudice. In addition, the trial judge not only offered a curative instruction, but specifically asked Rutledge's counsel what she wanted done. In a decision that was likely well-informed by her trial experience and reached after consultation with her client, Rutledge's counsel decided that dwelling on the incident was unwise. Her failure to request the voir dire at this time supports our belief that Rutledge's encounter with the jurors had no effect on his trial and that this encounter could only have prejudiced him if the jurors had been browbeaten about it.

The task of trying cases is one of dizzying pace and fraught with unexpected twists and turns. All parties to this trial (save Rutledge himself) surely sought to prevent the very incident that happened in this case, but it happened nevertheless. The trial judge acted swiftly and offered Rutledge the remedy of his choice. If Rutledge's counsel had been hell-bent on voir dire ' ing the jurors, she had ample opportunity to request that of the trial judge. Rutledge and his counsel thought it best to put the incident behind them and move on; the trial judge agreed. We believe Rutledge suffered no prejudice, that the trial judge and Rutledge's counsel recognized that there was no prejudice, and that the trial judge handled this incident properly. [FN2]

FN2. Because Rutledge suffered no prejudice from the jurors' inadvertent sighting of him in handcuffs, we refrain from discussing Rutledge's role in creating whatever effect there may have been on his trial. Suffice it to say that defendants are well-advised to act as diligently as the court personnel in avoiding this type of incident.

[4] Rutledge next complains of the admission of certain testimony by Malott linking Rutledge with the Latin Kings. He claims that this testimony was offered to inflame the jury, that its prejudicial effect greatly outweighed its probative value, and that it should have been excluded, apparently pursuant to Federal Rule of Evidence 403. We disagree.

Malott testified that after Rutledge was arrested in July 1989, he cooperated with agents from the Illinois State Police by giving them a statement concerning Rutledge's drug operation. Later, Malott discovered that Rutledge had obtained a copy of Malott's statement upon his release from prison. Rutledge then contacted Malott by telephone to inform Malott that Rutledge had a bullet with Malott's name on it. The two men met, and Rutledge showed Malott his copy of Malott's statement. Rutledge then waived a handgun at Malott and said:

> We're going to have to get this straightened out. You know, I can have the Latin Kings down here in two hours to take care of this. I'm not going to jail for twenty years over your lying, making these kind of statements.

*885 One week after Rutledge threatened Malott, Malott discovered a copy of his statement affixed to the side window of his truck; the letters "LK" were spray-painted in red on the statement. Two days later, three Hispanic men, believed by Malott to be members of the Latin Kings, drove their car into the driveway of Malott's home. Malott scared them off by brandishing a shotgun.

Rutledge's threats were enough to cause Malott to perjure himself before the state grand jury by denying that Rutledge operated a drug ring. At trial, the government offered Malott as one of its principal witnesses against Rutledge and the others. The government offered Malott's testimony describing Rutledge's threats, which necessarily invoked Rutledge's gang affiliation, to meet what it expected to be vigorous attempts to impeach Malott on the basis of his prior inconsistent statements before the state grand jury. Over objections, the trial judge allowed Malott to testify to Rutledge's threats. As expected, counsel for each defendant extensively cross-examined Malott about his previous perjury.

[5] Rule 403 operates to exclude otherwise

relevant evidence only if its probative value is substantially outweighed by its potential to create unfair prejudice to the defendant. In this instance, the trial court determined that Malott's testimony regarding Rutledge's threats should not be excluded. We review the trial court's decision to admit evidence for an abuse of that court's discretion. See, e.g., United States v. Williams, 31 F.3d 522, 527 (7th Cir.1994). It is clear to us that the district court did not abuse its discretion in admitting this aspect of Malott's testimony.

Naturally, the vast majority of the government's evidence against a defendant is prejudicial to him. That's the idea. But in order to find that a particular piece of evidence must be excluded pursuant to Rule 403, its probative value must be insignificant compared to its inflammatory nature so that the evidence unfairly prejudices the defendant. That is not the case here. The government had a right to rehabilitate Malott as a witness by explaining his prior perjury; to do so, Malott was required to recount the reasons that he had perjured himself. Rutledge does not deny that Malott's testimony is true, he simply claims that his testimony is too prejudicial.

Rutledge seems to argue that simply connecting a defendant with a gang constitutes unfair prejudice that substantially outweighs any probative value. We have approved, however, the admissibility of evidence of gang affiliation in a number of cases for a number of purposes. See, e.g., United States v. Rodriguez, 925 F.2d 1049, 1053 (7th Cir.1991); United States v. Lewis, 910 F.2d 1367, 1372 (7th Cir.1990) (collecting cases). More specifically, we have permitted its admissibility to explain a witness's prior inconsistent statement made out of fear of gang retaliation. United States ex rel. Garcia v. Lane, 698 F.2d 900, 902 (7th Cir.1983). Malott's testimony regarding Rutledge's threats was highly probative evidence explaining Malott's prior inconsistent statement, and the trial court did not abuse its discretion in admitting it.

[6] Rutledge's third argument is that because Rick Bolen did not testify at trial or at the sentencing hearing all statements attributed to him in the presentence report should have been omitted. He claims that because he was unable to cross-examine Bolen, Bolen's statements do not have the requisite indicia of reliability. Rutledge misperceives the reliability requirement.

At the sentencing hearing, Rutledge objected to the district court's consideration of Bolen's statements in the presentence report. Bolen's statements told of the incident in which Rutledge showed Bolen the marijuana and cocaine in the trunk of Rutledge's car and of other occasions on which Bolen accompanied Rutledge to Iowa to deliver or obtain cocaine. To establish Bolen's reliability, the government called the case agent, Bruce Harmening. Harmening testified that he had compared the statements in the presentence report given by Bolen with the statements and trial testimony of other witnesses and with the physical evidence and found no significant inconsistencies. He testified that there were some minor inconsistencies, such as a variance of a few days with respect to *886 dates of excursions to obtain drugs and slight differences in estimations as to the amount of cocaine Rutledge sold weekly. The district court found Harmening's testimony sufficient to support the probation officer's position in the presentence report.

The court then informed Rutledge that in order to challenge Bolen's statements, he must present evidence in addition to a simple denial demonstrating that Bolen's statements were not true. Rutledge discussed with his counsel whether to present any such evidence during a brief recess. They then informed the court that they would not present any evidence.

The district court conducted this aspect of Rutledge's sentencing hearing precisely in accordance with the controlling case in this circuit, United States v. Coonce, 961 F.2d 1268 (7th Cir.1992). In Coonce, we articulated the proper procedure for contesting facts upon which a district court relies to sentence a defendant. We stated:

> First, the defendant must challenge the facts in the presentence report ... as being unreliable or incorrect. Having done so, and assuming the facts as presented bear sufficient indicia of reliability, the defendant must carry the burden of presenting some evidence beyond a mere denial calling the reliability or correctness of the alleged facts into question. If the defendant meets this burden of production, the burden of persuasion then shifts back to the prosecution, who in turn must convince the court that the facts presented by the government are actually true.

Id. at 1280. Rutledge contends that the facts he has called into question, Bolen's statements, do not bear an indicia of reliability sufficient to trigger his burden of production under Coonce. He claims that Bolen's statements are simply naked assertions; as a result, he asserts that Coonce permits a mere denial to render them inapplicable in sentencing.

As an initial matter, Bolen's statements are not simply naked assertions. Plenty of other witnesses intimately involved in Rutledge's operation testified about his drugs and guns; that Bolen's statements are consistent with these other accounts indicates that they are based in fact. See United States v. Westbrook, 986 F.2d 180 (7th Cir.1993). In addition, this consistency coupled with Harmening's testimony adequately support the district court's finding that Bolen's statements bear a sufficient indicia of reliability. Rutledge's challenge to these statements, therefore, fails.

[7][8] Rutledge's fourth and final argument is that his Fifth Amendment rights have been violated because he was convicted and sentenced for operating a continuing criminal enterprise and for conspiracy to distribute cocaine. The Double Jeopardy Clause of the Fifth Amendment protects defendants from being tried and punished for the same offense twice. While the conspiracy charge is a lesser included offense of the CCE charge, double jeopardy is not implicated as long as district court does not impose cumulative sentences for the crimes. United States v. Bond, 847 F.2d 1233, 1238 (7th Cir.1988); see also Jeffers v. United States, 432 U.S. 137, 157-58, 97 S.Ct. 2207, 2219-20, 53 L.Ed.2d 168 (1977). This is because:

> [O]ne can both conspire (agree to run a drug business) and run a continuing criminal enterprise (strike the agreement and succeed).... The statutes reach the same group of persons. It is not illogical to convict a person of both agreeing to do something (§ 846) and succeeding on a grand scale (§ 848).

Bond, 847 F.2d at 1238. Concurrent sentences may be imposed for conspiracy and CCE provided the cumulative punishment does not exceed the maximum under the CCE act. United States v. Bafia, 949 F.2d 1465, 1473 (7th Cir.1991); Bond, 847 F.2d at 1239.

[9] In this case, the district court sentenced Rutledge to life imprisonment on his CCE conviction and life imprisonment on the conspiracy conviction to run concurrently with the CCE sentence. The maximum penalty under the CCE act at the time of Rutledge's sentencing was life imprisonment. Thus, by imposing concurrent sentences, the district court did not impose a cumulative penalty, and Rutledge's sentence is proper.

*887 B. Shelly Henson

[10] Henson's first argument is that the government's evidence against her is insufficient to support her conviction. In her brief, she went so far as to say: "Clearly, there was no specific evidence as to Shelly Henson's role in regard to said conspiracy." We disagree; the government presented evidence that overwhelmingly supports Henson's conviction.

[11] In reviewing Henson's claim, we must review the evidence in a light most favorable to the government, drawing all reasonable inferences. Then, we must ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The government's evidence featured testimony from several witnesses intimately involved in Rutledge's drug conspiracy. Kim Mummert testified that Henson obtained

cocaine for Rutledge, sold drugs that she received from Rutledge while living with him in the trailer, and helped pay the bills with money she earned selling Rutledge's drugs. Randy Mustread testified that Henson sold cocaine for Rutledge, delivered cocaine for him, and collected payment. Roger Malott testified that Henson cut cocaine for Rutledge, delivered cocaine for him, and collected payment. Malott also testified that Henson kept Rutledge's accounts regarding drug transactions. Michael Wright testified that Henson arranged cocaine sales for Rutledge and collected payments. The government's evidence easily supports Henson's conviction.

[12] Henson next argues that the district court abused its discretion by admitting evidence of a pistol she had in her possession. Although the district court provided the jury with several instructions regarding the limited purposes for which they could consider this evidence, Henson maintains that the jury was unable to follow these instructions. The district court properly admitted this evidence.

The gun was obtained by authorities from Henson when she and Wright were arrested in early 1989 in possession of one ounce of cocaine. The .25 caliber semi-automatic handgun and ammunition were found in Henson's purse. The police also found in Henson's purse Western Union money transfers which represented payment for drugs that Rutledge purchased from Randy Mustread.

The gun was introduced by Illinois State Police Special Agent Bruce Kettlekamp, who testified that he had discovered the gun in Henson's purse during the course of her arrest. Henson's counsel objected to the gun's relevancy, and district court overruled the objection and admitted the testimony for the limited purposes of showing a connection between Rutledge and Henson and for supporting the weapons charges against Rutledge. An ATF agent then testified as to the chain of custody of the gun, at which time the district court again reminded the jury of the limited purposes of the testimony regarding the gun. In addition, Wright, Mustread, and Malott all testified that Henson carried the gun, which was given to her by Rutledge ostensibly for her protection. During the testimony of each of these witnesses, the district court again admonished to consider the testimony for Henson's connection to Rutledge and with respect to Rutledge's gun charge.

It is clear that the district court addressed this situation perfectly. The government properly presented this evidence to demonstrate Henson's role in Rutledge's drug enterprise and to connect Rutledge to the gun. Any potential for prejudice to Henson was snuffed out by the district court's repeated warnings to the jury. And, of course, we presume that jurors do what they are told. See, e.g., United States v. Scott, 19 F.3d 1238, 1244 (7th Cir.1994) (citations omitted). The district court therefore properly admitted the evidence of the gun.

[13] Henson's next argument centers on a statement made by a prosecutor during closing argument. At that time, one of the prosecutors commented on the credibility of a defense witness. The prosecutor commented that this witness claimed that she saw Roger Malott near her home during the time in which Malott was in custody. The prosecutor then stated that "[t]he defense should have been embarrassed to hear her say that." Henson's counsel immediately objected, *888 and the district court sustained the objection. The prosecutor went on to state that the witness' testimony was a physical impossibility, to which Henson's counsel did not object. Henson argues that the prosecutor's statement was so prejudicial to her that she requires a new trial.

[14] We evaluate the prosecutor's comments to determine whether they were improper. United States v. Neely, 980 F.2d 1074, 1084-85 (7th Cir.1992). If so, a new trial is warranted only if "the prosecutor's comments infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (citation omitted). The prosecutor's

comments in this case, while improper, do not remotely rise to the level of a due process violation. They were directed at a witness for another defendant and did not bear at all on the evidence presented against Henson. Also, the judge quickly granted Henson's counsel's objection, and Henson's counsel had ample opportunity to counter the prosecutor's comments during the course of her argument. Finally, the evidence was so overwhelmingly against Henson on the conspiracy charge on which she was convicted that this minor transgression did not affect her guilty verdict at all.

[15] Henson's last argument, also advanced by Richard Hagemaster, is that the district court erred in giving the government's multiple conspiracy instruction rather than one she preferred. Henson claimed that she was not involved in Rutledge's cocaine conspiracy, but in different conspiracies for which she was not prosecuted; she preferred a detailed instruction that she believed was necessary to present her defense. Notwithstanding the overwhelming evidence of her participation in Rutledge's cocaine operation, the district court, who admitted doubt of its necessity, gave the government's multiple conspiracy instruction. Again, the district court made the proper decision.

[16][17][18] In reviewing the fitness of jury instructions to which objections were properly raised in the proceedings below, "we must determine from looking at the charge as a whole, 'whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.' " United States v. Boykins, 9 F.3d 1278, 1285 (7th Cir.1993) (quoting Trustees of Indiana Univ. v. Aetna Casualty and Sur. Co., 920 F.2d 429, 437 (7th Cir.1990)). A defendant is not entitled to have a particular instruction presented to the jury, but only to have her theory of the defense presented. United States v. Boucher, 796 F.2d 972, 976 (7th Cir.1986). In these matters, the district court is given substantial discretion with respect to the specific wording of the instruction. United States v. Penson, 896 F.2d 1087, 1090 (7th Cir.1990).

The instruction tendered by the government and given by the district court informed the jury that if it should find that a particular defendant did not join the conspiracy that was charged in the indictment, it must find the defendant not guilty of conspiracy. This is the very instruction of which we approved in similar circumstances in Penson, 896 F.2d at 1091. Since we are not sure that a multiple conspiracy instruction is even warranted in this case, we agree with the district court that government's tendered instruction "is all any defendant could legitimately ask for in relation to this type of instruction." Henson and Hagemaster were not prejudiced by the district court's failure to give their preferred multiple conspiracy instruction.

C. Richard Hagemaster

[19] Hagemaster's principal argument is that the district court erred in admitting Michael Wright's in-court identification of Hagemaster. He claims that Wright's identification is unreliable and therefore constitutes a denial of his Fifth Amendment Due Process rights. This argument is without merit.

During the course of the trial, Wright described a particular drug transaction that transpired in 1988 in which he gave money to Henson to deliver to Rutledge in exchange for an ounce of cocaine. Wright testified that he had waited several hours and after calling Rutledge twice to remind him of his order, Rutledge assured Wright that the courier was on his way. Wright continued:

> *889 Forty-five minutes to an hour later, a car pulled up in the driveway, an old VW bug with no fenders on the rear end, and a tall, skinny guy got out wearing a fatigue jacket, pearl earring in his ear. Like I say, a very slender person. Crowe let him in. He introduced me to--I believe his name was--his name was Rick at the time. And we sat there and talked and, anyway, this guy, this Rick or the guy that had brought the dope, he threw it out on the coffee table and he said, "This is what it is."

Wright testified that he was displeased with the quality of the cocaine and that

Hagemaster must have realized Wright's displeasure by the expression on his face because Hagemaster informed Wright that if the cocaine was unacceptable, Rutledge would return Wright's money. Wright then identified Hagemaster, in court and seated at the defense table, as the cocaine courier.

On cross-examination, Hagemaster's counsel pressed Wright for more details of the transaction. Wright happily obliged. Wright described Hagemaster's clothing again and testified that Hagemaster sat for thirty minutes in his living room where there were three or four lamps providing light. Wright also testified that he had seen Hagemaster on another occasion at Rutledge's trailer when Wright was there to obtain cocaine.

Wright also testified that he had originally described Hagemaster to investigating agents in 1990. Also, in a subsequent meeting with them, the agents showed Wright a single photograph and asked him whether he recognized the person in the photograph. The person in the photograph was Richard Hagemaster, although the agents did not so identify him to Wright. It is the presentation of the single photograph of Hagemaster to Wright that Hagemaster claims was so suggestive as to render Wright's in-court identification of Hagemaster unreliable.

[20] The admissibility of a challenged in-court identification is governed by a two-part test. First, we must determine whether the initial out-of-court identification was unduly suggestive; here, the presentation of the single photograph of Hagemaster. If so, the in-court identification is inadmissible unless it is so reliable, in view of the totality of the circumstances, as to prevent a substantial likelihood of misidentification. Manson v. Brathwaite, 432 U.S. 98, 107-14, 97 S.Ct. 2243, 2249-53, 53 L.Ed.2d 140 (1977). The district court determined that the presentation of the single photograph of Hagemaster to Wright was unduly suggestive, and we do not disagree. But we also agree with the district court that Wright's in-court identification of Hagemaster was sufficiently reliable that it withstands Hagemaster's due process challenge.

[21] Our inquiry into the reliability of Wright's in-court identification of Hagemaster is guided by several factors: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time of the crime and the confrontation. United States v. Larkin, 978 F.2d 964, 970 (7th Cir.1992) (citing Manson, 432 U.S. at 114, 97 S.Ct. at 2253). In this case, the totality of the circumstances, within the framework of these factors, demonstrates that Wright's in-court identification was indeed reliable.

Wright testified that he spent thirty minutes with Hagemaster in his well-lighted living room at the time of the crime. This provided Wright with ample opportunity to view Hagemaster. Wright's testimony indicates that he was quite attentive during the commission of the crime. He described Hagemaster's VW bus and his appearance in significant detail. In addition, Wright's belief that Hagemaster could see the displeasure register on Wright's face indicates that the two men were in reasonably close proximity with one another, each capable of noticing the other's features and expressions. And while the lapse of time between the time of the commission of the crime and the trial is not insignificant, Wright's detailed description of Hagemaster and his conviction that the man at the defense table was Hagemaster demonstrate that the identification was reliable. The district court properly admitted Wright's in-court identification of Hagemaster. *890 Hagemaster's other claims are without merit and do not require discussion.

III. Conclusion

For the foregoing reasons, the convictions of Tommy Lee Rutledge, Shelly Henson, and Richard Hagemaster are

AFFIRMED.

AO 245 S (Rev. 4/90) Sheet 1 - Judgment in a Criminal Case

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FILED

United States District Court

DEC 29 1992

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

CENTRAL District of ILLINOIS

UNITED STATES OF AMERICA

V.

TOMMY L. RUTLEDGE

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 91-40009-01

Howard Vincent Thomas
Defendant's Attorney

THE DEFENDANT: Tommy L. Rutledge

☐ pleaded guilty to count(s) _____

☒ was found guilty on count(s) ~~1-6 of the second superseding indictment.~~ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:848	Continuing Criminal Enterprise	12/1/90	1
21:846	Conspiracy to possess with intent to distribute & to distribute cocaine, a schedule II controlled substance	12/1/90	2
21:841(a)(1) & 18:2	Distribution of cocaine, a schedule II controlled substance	12/1/90	3
18:922(g)	Felon in possession of a firearm	12/1/90	4
18:924(c)	Armed drug trafficker	12/1/90	5 & 6

The defendant is sentenced as provided in pages 2 through 12 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984..

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

☒ Count(s) ~~original cts.1.-3 & 1st superseding~~ counts 1-3 ~~XXX~~(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 300.00, for count(s) ~~1-6 of second superseding indictment~~ which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 361-38-1590

Defendant's Date of Birth: 06-11-47

Defendant's Mailing Address:

In custody

Defendant's Residence Address:

In custody

December 23, 1992
Date of Imposition of Sentence

Michael M. Mihm
Signature of Judicial Officer

MICHAEL M. MIHM-CHIEF, U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

December 29, 1992
Date

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Defendant: Tommy L. Rutledge
Case Number: 91-40009-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of life on Count 1 of 2nd Superseding Indictment; life without possible release to run concurrent to Count 1 on Count 2 of the 2nd superseding indictment; life without possible release to run concurrent to Counts 1 & 2 on Count 3 of the 2nd superseding indictment; ten (10) years on Count 4 of the 2nd superseding indictment to run concurrent with counts 1, 2 & 3; sixty (60) months on Count 5 of the 2nd superseding indictmnet to run consecutive to counts 1,2,3,4 & 6; one hundred twenty (120) months on Count 6 of the 2nd superseding indictment to run consecutive to Counts 1,2,3,4 & 5.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district.
- ☐ at _____ a.m. / p.m. on _____
- ☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
- ☐ before 2 p.m. on _____
- ☐ as notified by the United States marshal.
- ☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

FINE

The defendant shall pay a fine of $ _____. The fine includes any costs of incarceration and/or supervision.

☐ This amount is the total of the fines imposed on individual counts, as follows:

NO FINE, COSTS OF INCARCERATION OR RESTITUTION ARE APPROPRIATE.

☐ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:
☐ in full immediately.
☐ in full not later than _____.
☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
☐ in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

( ) The Court adopts the factual findings and guideline application in the Presentence Report.

OR

(X) The Court adopts the factual findings and guideline application in the Presentence Report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 40

Criminal History Category: VI

Imprisonment Range: Counts 1-4: ____ to life ~~months~~ Mandatory Min: Count 1: 20 years; Counts 2 & 3: life; Count 5: 5 years; Count 6: 10 years
Count 5:5years & Count 6:10 years

Supervised Release Range: 1 to 5 years
Count 1:3-5 years; Counts 2 & 3:N/A; Counts 4,5 &6:2-3 years

Fine: $25,000 to $8,000,000.00

(XX) Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ N/A

( ) Full restitution is not ordered for the following reason(s):

( ) The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

OR

(XX) The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):
pursuant to statutory enhancements of life imprisonment

OR

The sentence departs from the guideline range

( ) upon motion of the Government, as a result of defendant's substantial assistance.

( ) for the following reasons:

RE: RUTLEDGE, Tommy Lee

ADDENDUM II TO THE PRESENTENCE REPORT
DATED 09/23/92 AND REVISED 10/29/92

NAME: RUTLEDGE, Tommy Lee **DOCKET NO. 91-40009-01**

The following objections were raised by the Government and defendant and ruled on by the Court at the December 23, 1992, Sentencing Hearing.

OBJECTIONS

By the Government

I. Reference page 26, paragraph 146

A. The Government objects to paragraph 146 as a consecutive term of imprisonment of 60 months must be imposed on Count 5, and a consecutive term of imprisonment of 120 months must be imposed on Count 6.

B. The defendant neither objects nor concurs with the Government.

Court's Findings

1. ☐ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☐ Other: _____

_____

_____

By the Defendant

I. Reference page 19, paragraph 105

A. The defendant objects to paragraph 105 as the conviction in this paragraph was reversed and overturned by the State of Illinois Appellate Court. Therefore, the three criminal history points documented in this paragraph should be deleted.

B. The position of the Government and probation office concurs with that of the defendant.

Court's Findings

1. ☐ Court adopts probation officer's position.

RE: RUTLEDGE, Tommy Lee

Case No. 91-40009-01

2. ☐ Court adopts Government's position.
3. ☒ Court adopts defendant's position.
4. ☐ Other: _____

_____

_____

II. Reference page 19, paragraph 109

A. The defendant objects to paragraph 109 as the conviction contained in this paragraph was reversed and overturned by the State of Illinois Appellate Court. Therefore, the two criminal history points contained in this paragraph should be deleted.

B. The position of the Government and probation office concurs with that of the defendant.

Court's Findings

1. ☐ Court adopts probation officer's position.
2. ☐ Court adopts Government's position.
3. ☒ Court adopts defendant's position.
4. ☐ Other: _____

_____

_____

III. Reference page 21, paragraph 113

A. The defendant objects to paragraph 113 as the conviction contained in this paragraph was in regards to his son, Thomas L. Rutledge Jr., and not the defendant. Therefore, the one criminal history point contained in this paragraph should be deleted.

B. The position of the Government and the probation office concurs with that of the defendant.

Court's Findings

1. ☐ Court adopts probation officer's position.
2. ☐ Court adopts Government's position.
3. ☒ Court adopts defendant's position.

4. ☐ Other: _____

_____

_____

IV. Reference page 21, paragraphs 114 and 115

A. The defendant objects to the additional criminal history points contained in these paragraphs.

B. The position of the Government and probation office remains as stated in paragraphs 114 and 115.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☐ Other: _____

_____

_____

V. Reference page 23, paragraph 131

A. The defendant objects to paragraph 131 as the arrest contained in this paragraph involved the defendant's son, Thomas L. Rutledge Jr., and not the defendant.

B. The position of the Government and probation office concurs with that of the defendant.

Court's Findings

1. ☐ Court adopts probation officer's position.
2. ☐ Court adopts Government's position.
3. ☒ Court adopts defendant's position.
4. ☐ Other: _____

_____

_____

VI. Reference pages 13, 14, and 17, paragraphs 85, 86, 87, and 98

A. The defendant objects to these paragraphs as he never made death threats against any witnesses, codefendants, or U.S. Attorneys.

B. The position of the Government and probation office remains as stated in paragraphs 85, 86, 87, and 98.

Court's Findings

1. ☐ Court adopts probation officer's position.
2. ☐ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☒ Other: The Court found the defendant did threaten witnesses and codefendants. However, the Court was unable to determine if the letter (poem entitled "Satan Letter") prepared by the defendant was intended to be threatening.

VII. Reference Offense Conduct

A. The defendant objects to all statements by all the codefendants concerning the quantities of cocaine, arson, and trade of weapons as all of these statements are untrue and based upon mere heresay.

B. The position of the Govenrment and probation office remains as stated in the Offense Conduct section of the Presentence Report.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☐ Other: _____

_____

_____

VIII. Reference page 3, paragraph 14

A. The defendant objects to paragraph 14 as Richard Hagemaster never delivered cocaine for the defendant, Tom Rutledge and Don Taylor never

traveled to Iowa to purchase cocaine, Tom Rutledge and Shelly Henson never distributed cocaine, and Stan Winters never delivered cocaine for Tom Rutledge.

B. The position of the Government and probation office remains as stated in paragraph 14.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☐ Other: _____

_____

_____

IX. Reference page 3, paragraph 16

A. The defendant objects to paragraph 16 as he did not possess numerous firearms at any time.

B. The position of the Government and probation office remains as stated in paragraph 16.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☐ Other: _____

_____

_____

X. Reference page 3, paragraph 17

A. The defendant did not carry a firearm or carry a firearm during and in relation to any drug trafficking crime. Further, the U.S. Government dismissed the charges against Tom Rutledge for possessing firearms on or about July 14, 1989.

B. The position of the Government and probation office remains as stated in paragraph 17.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☐ Other: _____

_____

_____

XI. Reference page 5, paragraphs 29, 30, and 31

A. The defendant objects to these paragraphs as Rick Bolen did not testify during the trial and cannot be considered a credible witness.

B. The position of the Government and probation office remains as stated in paragraphs 29, 30, and 31.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☐ Other: _____

_____

_____

XII. Reference Offense Conduct

A. The defendant objects to the offense conduct as he did not possess, sell, or distribute or conspire to do any drug transactions.

B. The position of the Government and probation office remains as stated in the Offense Conduct section of the Presentence Report.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.
3. ☐ Court adopts defendant's position.

RE: RUTLEDGE, Tommy Lee
Case No. 91-40009-01

4. ☐ Other: _____

_____

_____

XIII. Reference page 5, paragraph 33

A. The defendant objects to paragraph 33 as he did not visit Mustread in Galesburg, Illinois, and he did not purchase 4 ounces of cocaine.

B. The position of the Government and probation office remains as stated in paragraph 33.

Court's Findings

1. ☐ Court adopts probation officer's position.
2. ☐ Court adopts Government's position.
3. ☐ Court adopts defendant's position.
4. ☒ Other: The Court found that defendant Rutledge did not visit Mustread in Galesburg, Illinois. However, the Court did find that the defendant purchased 4 ounces of cocaine while with Mustread.

XIV. Reference page 6, paragraph 35

A. The defendant objects to paragraph 35 as John Wilson was called as a defense witness at trial and testified that he did not trade defendant Rutledge a Ruger rifle for cocaine.

B. The position of the Government and probation office remains as stated in paragraph 35.

Court's Findings

1. ☒ Court adopts probation officer's position.
2. ☒ Court adopts Government's position.

RE: RUTLEDGE, Tommy Lee
Case No. 91-40009-01

3. ☐ Court adopts defendant's position.
4. ☐ Other: _____

_____

_____

CERTIFIED BY

Wade B. Maddox

WADE B. MADDOX
U.S. Probation Officer

Reviewed and Approved:

Roger G. Ahrens

ROGER G. AHRENS
Deputy Chief U.S. Probation Officer
Date: 12/23/92

The Court adopts the above-listed findings on December 23, 1992

Michael M. Mihm

HONORABLE MICHAEL M. MIHM
Chief U.S. District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 3, 1995.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. JAMES L. FOREMAN, District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 93-1122 v. TOMMY L. RUTLEDGE Defendant-Appellant.	)	Appeal from the United States District Court for the Central District of Illinois, 91 CR 40009 Michael M. Mihm, Chief Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by defendant-appellant, a majority of the judges on the original panel have voted to deny and none of the judges in active service has requested a vote thereon.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

---

* The Honorable James L. Foreman, United States District Judge for the Southern District of Illinois, is sitting by designation.

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
AT ROCK ISLAND

UNITED STATES OF AMERICA, Plaintiff, v. TOMMY LEE RUTLEDGE, SHELLY HENSON, RICHARD HAGEMASTER, STAN WINTERS, and DONALD TAYLOR, Defendants.	)	Criminal No. 91-40009 VIO: Title 18, United States Code, Sections 2, 922(g) and 924(c); Title 21, United States Code, Sections 841(a)(1), 846 and 848

SECOND SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT 1

Beginning in or about early 1988 and continuing at least until in or about late 1990, in Warren County, Illinois, within the Central District of Illinois, and elsewhere,

TOMMY LEE RUTLEDGE,

the defendant herein, knowingly and intentionally did engage in a continuing criminal enterprise, namely a series of violations of Title 21, United States Code, Sections 841(a)(1) and 846 by repeatedly distributing and possessing with intent to distribute quantities of cocaine, which continuing series of violations were undertaken by

TOMMY LEE RUTLEDGE

in concert with at least five (5) other persons with respect to whom

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TOMMY LEE RUTLEDGE

occupied positions of organizer, supervisor, and other positions of management, and from which continuing series of violations

TOMMY LEE RUTLEDGE

obtained substantial income and resources.

2. As part of this continuing criminal enterprise, the defendant,

TOMMY LEE RUTLEDGE,

committed and caused to be committed numerous acts, including but not limited to the acts set forth hereinafter in Counts 3, 4 and 5, which counts are incorporated by reference as if fully set forth here.

In violation of Title 21, United States Code, Section 848.

COUNT 2

1. Beginning in or about early 1988, and continuing until in or about late 1990, in Warren County, within the Central District of Illinois and elsewhere,

TOMMY LEE RUTLEDGE,
SHELLY HENSON,
RICHARD HAGEMASTER,
STAN WINTERS, and
DONALD TAYLOR,

the defendants herein, did knowingly combine, conspire and agree with each other and both with persons known and with persons unknown to the grand jury to commit certain acts in violation of the laws of the United States, to-wit: (a) to knowingly possess with intent to distribute cocaine, a Schedule II controlled substance; and (b) to knowingly distribute cocaine, a Schedule II controlled substance, both in violation of Title 21, United States Code, Section 841(a)(1).

2. Over the course of the conspiracy that the defendants distributed and caused to be distributed in excess of 5 kilograms of cocaine.

OVERT ACTS

3. In furtherance of the conspiracy and to accomplish its objects of possessing with intent to distribute and distributing cocaine, the defendants and other persons both known and unknown to the grand jury did commit overt acts, including but not limited to the following:

1. In late 1988, Richard Hagemaster delivered cocaine to an individual for Tommy Lee Rutledge;

2. In early 1989, Tommy Lee Rutledge and Donald Taylor travelled to Iowa to purchase cocaine;

3. In January, 1989, Tommy Lee Rutledge and Shelly Henson distributed cocaine to an individual;

4. In mid-1990, Stan Winters delivered cocaine to an individual for Tommy Lee Rutledge.

All in violation of Title 21, United States Code, Section 846.

COUNT 3

In or about January, 1989, in Warren County, within the Central District of Illinois,

TOMMY L. RUTLEDGE, and
SHELLY HENSON,

the defendants herein, did knowingly distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18,

United States Code, Section 2.

COUNT 4

On or about July 14, 1989, in Warren County, within the Central District of Illinois,

TOMMY L. RUTLEDGE,

the defendant herein, did knowingly possess a firearm which had previously travelled in interstate or foreign commerce, to-wit: numerous shotguns, rifles and pistols, the defendant having been previously convicted under the laws of the State of Illinois of a crime punishable by imprisonment for a term exceeding one year.

In violation of Title 18, United States Code, Section 922(g).

COUNT 5

In or about July, 1989, in Warren County, within the Central District of Illinois,

TOMMY LEE RUTLEDGE,

the defendant herein, did knowingly use and carry a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is the distribution of cocaine, in violation of Title 21, United States Code, Section 841.

In violation of Title 18, United States Code, Section 924(c).

COUNT 6

On or about July 14, 1989, in Warren County, within the Central District of Illinois,

TOMMY LEE RUTLEDGE,

the defendant herein, did knowingly use and carry a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States,

that is, the distribution of controlled substances and the possession of controlled substances with intent to distribute, in violation of Title 21, United States Code, Section 841.

In violation of Title 18, United States Code, Section 924(c).

A True Bill,

Mary E. Carman
Foreperson

J. William Roberts by Byron Cudmore
J. WILLIAM ROBERTS
UNITED STATES ATTORNEY

Tommy L. Rutledge
Reg. No. 08829-026
Post Office Box 1000
Leavenworth, KS 66048-7000

October 6, 1994

Thomas F. Strubble, Clerk
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Re: United States v. Tommy L. Rutledge
Case No. 91-CR-40009, Appeal No. 931122

Dear Mr. Strubble:

Pursuant to Federal Rule of Appellate Procedure 28(j), I would like to bring the Court's attention to the recent decision United States v. Cappas, 29 F.3d 1187 (7th Cir. 1994). In Cappas this Court held a defendant cannot be punished separately for both CCE and conspiracy quoting United States v. Bafia, 949 F.2d 1465, 1472-75 (7th Cir. 1991), cert. denied, 112 S.Ct. 1989 (1992).

I would like to point out one important fact concerning the Bafia case. The Court in Bafia stated:

> " . . . to understand the rather confusing progression of Jefferson (hereinafter 'Jefferson I') and it subsequent history-and, we hope, to resolve once and for all (or at least until the Supreme Court directs other wise) any confusion regarding multiple sentences under §§ 846 and 848--we shall trace the development of the law of conspiracy and CCE conviction."

949 F.2d at 1472.

This Court stated: "until the Supreme Court directs otherwise" and the Supreme Court has directed otherwise." See Mohwish v. United States, rev'd and remanded for further consideration of position presently asserted by the Acting Solicitor General, 113 S.Ct. 1378 (1993) (No. 92-982). In Mohwish the Solicitor General stated:

> "On appeal, petitioner argued that, under Jeffers v. United States, 432 U.S. 137, 154-58 (1977), his conviction for drug

> conspiracy in violation of 21 U.S.C. 846, on which he had received a sentence concurrent with his sentence for the CCE violation, must be vacated in light of his CCE conviction. The government agreed that upon petitioner's valid CCE conviction, the drug conspiracy conviction should be vacated. Gov't C.A. Br. 46-47. The court of appeals, however, did not address that issue and instead affirmed petitioner's drug conspiracy conviction.
>
> ***************
>
> As we explained in our brief in opposition to the petition for certiorari in Fernandez v. United States, cert. denied, 111 S.Ct. 2249 (1991) (No. 90-7210), Congress did not intend to permit cumulative punishment for participating in a drug conspiracy and engaging in a continuing criminal enterprise, at least where the evidence supporting the "in concert" element of the CCE offense is essentially indistinguishable from the evidence supporting the drug conspiracy charge. See Garrett v. United States, 471 U.S. 773, 794 (1985); Jeffers v. United States, 432 U.S. 137, 155 (1977) (plurality opinion).

Respondent's Brief at 13-14.

In the case at bar, the conspiracy was charged as a predicate in the CCE charge in Count One of the indictment.

Respectfully submitted,

Tom L. Rutledge
Tommy Rutledge
Defendant-Appellant Pro Se

CERTIFICATE OF SERVICE

I hereby certify that I placed a true and correct copy of the forgoing in the Prisoner's Mail Box located at the United States Penitentiary in Leavenworth, Kansas, this 5th day of October, 1994, first class postage affixed to:

K. Tate Chamber, AUSA
100 N.E. Monroe
Peoria, IL 61602
(309) 671-7050

Julia Gentile, Esq.
RR 2
Petersburg, IL 62675

for the purpose of service.

_____
Tommy L. Rutledge

TOMMY L. RUTLEDGE
Register Number 08829-026
Post Office Box 1000
Leavenworth, KS 66048-7000

DEFENDANT-APPELLANT PRO SE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, v. TOMMY L. RUTLEDGE, Defendant.	)	Case No. 93-1122

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

I. THE COURT OVERLOOKED THE SUPREME COURT'S RECENT DECISION IN MOHWISH WHICH MANDATES THE LESSER INCLUDED OFFENSE OF CONSPIRACY BE VACATED IN THIS CASE

On page 11 of its opinion, the Court overlooked or misconstrued a recent ruling concerning an issue raised by Rutledge. In addressing Rutledge's argument concerning his Fifth Amendment right to be free of double jeopardy, the Court held:

> "The Double Jeopardy Clause of the Fifth Amendment protects defendants from being tried and punished for the same offense twice. While conspiracy is a lesser included offense of the CCE charge, double jeopardy is not implicated as long as district court does not impose cumulative sentences for the crimes."
>
> * * * * * * * * * * * * * * *
>
> "Concurrent sentences may be imposed for conspiracy and CCE provided the cumulative punishment does not exceed the maximum under the CCE act."

Opinion at 11.

In United States v. Bafia, 949 F.2d 1465, 1472 (7th Cir. 1991), cert. denied, 112 S.Ct. 1989 (1992), this court held: "until the Supreme Court directs otherwise" convictions under conspiracy and CCE do not violate the double jeopardy clause.

The Court is overlooking the fact that the Supreme Court has directed otherwise. On March 1, 1993, the Supreme Court in Mohwish v. United States, ___ U.S. ___, 113 S.Ct. 1378, 122 L.Ed.2d 754 (1993), Case No. 92-982, reversed and remanded for reconsideration of the position presently asserted by the Acting Solicitor General in his brief for the United States filed February 5, 1993. In Mohwish, the Solicitor General stated:

> "As we stated in our brief in opposition to the petition for certiorari in Fernadez v. United States, cert. denied, 111 S.Ct. 2249 (1991) (No. 90-7210), Congress did not intend to permit cumulative punishment for participating in a drug conspiracy and engaging in continuing criminal enterprise, at least where the evidence supporting the 'in concert' element of the CCE offense is essentially indistinguishable from the evidence supporting the drug conspiracy charge. See Garrett v. United States, 471 U.S. 773, 794 (1985); Jeffers v. United States, 432 U.S. 137, 155 (1977) (plurality opinion)."

See Attachment 1, Solicitor General's Brief at 13-14.

Mohwish's claim was identical to the argument put forward by Rutledge, and the Supreme Court reversed and remanded to the district court with instructions to vacate Mohwish's conviction for the conspiracy. Moreover, Rutledge's claim has gone unopposed by the government in this case. This Court should follow the Supreme Court's directive and remand to the district

court with instructions to vacate Rutledge's conspiracy conviction.

The Court should grant rehearing en banc in this case to bring this circuit in line with Supreme Court precedent and to bring this circuit in line with the other circuits now holding that when a defendant is convicted of conspiracy and CCE, the conspiracy conviction must be vacated.

Respectfully submitted,

Tom L. Rutledge
Tommy L. Rutledge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 6 day of December, 1994, to:

K. Tate Chamber, AUSA
100 N.E. Monroe
Peoria, IL 61602

Julia Gentile
Post Office Box 952
Springfield, IL 62705

for the purpose of service herein.

Tom L. Rutledge
Tommy L. Rutledge

Citation
21 USCA s 848
21 U.S.C.A. s 848

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UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I--CONTROL AND ENFORCEMENT
PART D--OFFENSES AND PENALTIES

Current through P.L. 103-465, approved 12-8-94

s 848. Continuing criminal enterprise

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this chapter; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this chapter.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section if--
(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and
(2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or
(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if--
(1) he violates any provision of this subchapter or subchapter II of this

chapter the punishment for which is a felony, and
(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter--
(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

(e) Death penalty

(1) In addition to the other penalties set forth in this section--
(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) or section 960(b)(1) who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and
(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.
(2) As used in paragraph (1)(b), the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

(g) [FN1] Hearing required with respect to the death penalty

A person shall be subjected to the penalty of death for any offense under this section only if a hearing is held in accordance with this section.

(h) Notice by the Government in death penalty cases

(1) Whenever the Government intends to seek the death penalty for an offense under this section for which one of the sentences provided is death, the

attorney for the Government, a reasonable time before trial or acceptance by the court of a plea of guilty, shall sign and file with the court, and serve upon the defendant, a notice--

(A) that the Government in the event of conviction will seek the sentence of death; and

(B) setting forth the aggravating factors enumerated in subsection (n) of this section and any other aggravating factors which the Government will seek to prove as the basis for the death penalty.

(2) The court may permit the attorney for the Government to amend this notice for good cause shown.

(i) Hearing before court or jury

(1) When the attorney for the Government has filed a notice as required under subsection (h) of this section and the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at the trial or before whom the guilty plea was entered is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted--

(A) before the jury which determined the defendant's guilt;

(B) before a jury impaneled for the purpose of the hearing if--

(i) the defendant was convicted upon a plea of guilty;

(ii) the defendant was convicted after a trial before the court sitting without a jury;

(iii) the jury which determined the defendant's guilt has been discharged for good cause; or

(iv) after initial imposition of a sentence under this section, redetermination of the sentence under this section is necessary; or

(C) before the court alone, upon the motion of the defendant and with the approval of the Government.

(2) A jury impaneled under paragraph (1)(B) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate with the approval of the court that it shall consist of any number less than 12.

(j) Proof of aggravating and mitigating factors

Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in subsections (m) and (n) of this section, or any other mitigating factor or any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Where information is presented relating to any of the aggravating factors set forth in subsection (n) of this section, information may be presented relating to any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Information presented may include the

trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The Government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The Government shall open the argument. The defendant shall be permitted to reply. The Government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

(k) Return of findings

The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist. If one of the aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in subsection (n)(1) of this section is not found to exist or an aggravating factor set forth in subsection (n)(1) of this section is found to exist but no other aggravating factor set forth in subsection (n) of this section is found to exist, the court shall impose a sentence, other than death, authorized by law. If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence. The jury or the

court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

(l) Imposition of sentence

Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law. A sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed. A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability--

(1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or

(2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

(m) Mitigating factors

In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following:

(1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) The defendant is punishable as a principal (as defined in section 2 of Title 18) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

(5) The defendant was youthful, although not under the age of 18.

(6) The defendant did not have a significant prior criminal record.

(7) The defendant committed the offense under severe mental or emotional disturbance.

(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(9) The victim consented to the criminal conduct that resulted in the victim's death.

(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

(n) Aggravating factors for homicide

If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall be considered, unless notice of additional aggravating factors is provided under subsection (h)(1)(B) of this section:

(1) The defendant--

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;

(D) intentionally engaged in conduct which--

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim.

(2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(3) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.

(4) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(8) The defendant committed the offense after substantial planning and premeditation.

(9) The victim was particularly vulnerable due to old age, youth, or infirmity.

(10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(11) The violation of this title in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 859 of

this title.
(12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(o) Right of the defendant to justice without discrimination

(1) In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be. The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.
(2) Not later than one year from November 18, 1988, the Comptroller General shall conduct a study of the various procedures used by the several States for determining whether or not to impose the death penalty in particular cases, and shall report to the Congress on whether or not any or all of the various procedures create a significant risk that the race of a defendant, or the race of a victim against whom a crime was committed, influence the likelihood that defendants in those States will be sentenced to death. In conducting the study required by this paragraph, the General Accounting Office shall--
(A) use ordinary methods of statistical analysis, including methods comparable to those ruled admissible by the courts in race discrimination cases under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. s 2000e et seq.];
(B) study only crimes occurring after January 1, 1976; and
(C) determine what, if any, other factors, including any relation between any aggravating or mitigating factors and the race of the victim or the defendant, may account for any evidence that the race of the defendant, or the race of the victim, influences the likelihood that defendants will be sentenced to death. In addition, the General Accounting Office shall examine separately and include in the report, death penalty cases involving crimes similar to those covered under this section.

(p) Sentencing in capital cases in which death penalty is not sought or imposed

If a person is convicted for an offense under subsection (e) of this section and the court does not impose the penalty of death, the court may impose a sentence of life imprisonment without the possibility of parole.

(q) Appeal in capital cases; counsel for financially unable defendants

(1) In any case in which the sentence of death is imposed under this section, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time prescribed for appeal of judgment in section 2107 of Title 28. An appeal under this section may be consolidated with an appeal of the judgment of conviction. Such review shall have priority over all other cases.
(2) On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.
(3) The court shall affirm the sentence if it determines that--
(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and
(B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

In all other cases the court shall remand the case for reconsideration under this section. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.
(4)(A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either--
(i) before judgment; or
(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).
(B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).
(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.
(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not

less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

(r) Refusal to participate by State and Federal correctional employees

No employee of any State department of corrections or the Federal Bureau of Prisons and no employee providing services to that department or bureau under contract shall be required, as a condition of that employment, or contractual obligation to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term "participation in executions" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

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UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I--CONTROL AND ENFORCEMENT
PART D--OFFENSES AND PENALTIES

Current through P.L. 103-465, approved 12-8-94

s 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

CREDIT(S)

1981 Main Volume

(Pub.L. 91-513, Title II, s 406, Oct. 27, 1970, 84 Stat. 1265.)